

FEB 06 2023

OFFICE OF
WATER

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

IN THE MATTER OF WATER) **TOMAS AND ERACLIO MARTINEZ'S**
APPLICATION NO. 2850-2, Elk) **RESPONSE TO MOTION TO DISMISS**
Mountain Water Users Association.)
Inc.

COMES NOW Tomas and Eraclio Martinez, by and through its undersigned counsel,
hereby respectfully submits their Response to Motion to Dismiss.

FACTUAL AND PROCEDURAL HISTORY

This application seeks to divert 150 gpm (.333 cfs) from the Madison aquifer from a well to be constructed for a water distribution system, commercial use, and fire protection. The well will be located in the NW1/4, NW1/4 Section 21-T4S-R1E, Custer County South Dakota. The Chief Engineer has recommended approval of the application. Notice of the Chief Engineer's application indicated that any person contesting the application shall file a petition by October 11, 2022. The Water Rights Program received the petition of Tomas and Eraclio on October 28, 2022.

Tomas and Eraclio Martinez own property located at 10216 Valley Rd., Edgmont South Dakota. *See*, Affidavit of Eraclio Martinez. This property makes part of their family cattle ranch. This property is adjacent to the property upon which the applicant seeks to drill the well associated with this application. The Martinez family has a Madison aquifer domestic well, which is located on their 10216 Valley Rd property. The well completion report for this well was received by the Water Rights Program on February 4, 2002. *See*, Exhibit A. This well completion report indicates that the well-driller encountered the Madison formation at 1020 feet deep, and the static water level was 890 feet below grade. The SD DANR well completion report data base places this well over one half-mile to the south of the proposed well site associated

with this application. *See, Exhibit B* (an excerpt from the South Dakota Water Rights Well Completion Report database including an estimate of the distance between the proposed point of diversion in this matter and the database's location of the Martinez well).

In recommending approval of this application, the Water Rights Engineer identified the "nearest domestic well completed into the Madison aquifer on file with the Water Rights Program" as a well "located approximately 0.7 miles south of this application in the SW1/4 Section 21 T4S-R1E" with depths to the Madison formation and a static water level matching that of the Martinez well. Presumably, this is the well discussed in the Report to the Chief Engineer.

But the Martinez well is not 0.7 miles away from the proposed well-site associated with this application. The Martinez well is located just to the southeast of the building site on 10216 Valley Rd. *See, Exhibit A* to Affidavit of Eraclio Martinez. An approximate measurement done on the Custer County GIS website shows the Martinez well and the proposed well site to be approximately less than 900 feet apart. *See, Exhibit C* (Exhibit C to the Response to Motion to Dismiss is the same as Exhibit A to the Affidavit of Eraclio Martinez). This is consistent with measurements taken on the ground by Eraclio Martinez. The proposed diversion from the Madison aquifer is not approximately 3,700 feet from the Martinez' domestic well, but less than a quarter of that distance away.

The Martinez family did not timely file a Petition in Intervention in this matter because they were on a family vacation at the time the Notice was published. *See, Affidavit of Eraclio Martinez*. By the time the Martinez family returned home, the time for submitting petitions had passed. *Id.*

ARGUMENT

The Water Rights' Program's Motion to Dismiss relies on SDCL 46-2A-4 as the legal authority for the proposition that the Martinez' petition should be dismissed. That section requires the public notice which must be published to include: "A statement that a person may only participate in the hearing if: . . . (c) The person files a petition to oppose the application with the chief engineer and applicant within ten days of the published notice[.]" SDCL 46-2A-4(4). While this statute requires timely submission of petitions, it does not prevent this Board from allowing late-filed petitions to be granted party status.

This Board has discretion to control its docket. The language of SDCL 46-2A-4 does not mandate this Board dismiss an untimely filed petition. Had the Legislature intended untimely submission of a petition to be a jurisdictional bar to a petitioner's participation, it could have specifically stated that. This Board has allowed participation by intervenors who have submitted untimely petitions in other matters. For example, in the Powertech proceedings, the Oglala Sioux Tribe Moved for admission as a party after untimely filing its petition to intervene. *See, Exhibit D.* The Oglala Sioux Tribe is currently a party to that proceeding.

Importantly, no party would suffer prejudice by allowing the Martinez family to participate. Petitioners in opposition filed a motion for auto-delay approximately 10 days after the Martinez family filed their petition. The hearing was then delayed from December to March. During that time, the Martinez family has been served with all pleadings and filings. It is also important to recognize that a timely petition in opposition was filed in this matter. So this is not a situation in which there will be no contested-case hearing without the Martinez family.

Here, the interests of fairness require that the Martinez family be allowed to fully participate in this hearing process. They own and utilize the closest well to the proposed

diversion point, and the location of that well to the proposed diversion point has not been considered by the Water Rights program. The report to the Chief Engineer states: "Some drawdown from this application is likely to occur and nearby well owners may need to lower their pumps or install pumps to access the water in the aquifer. Exact aquifer behavior cannot be known without an aquifer performance test." Report to the Chief Engineer at 8. The Martinez family wishes to express to the Water Management their concerns with the location of the well, and that the drawdown anticipated by the Report to the Chief Engineer has not been fully considered, given the actual locations of the well. Principles of fundamental fairness dictate that the Martinez family be allowed to fully participate as parties in this application process.

CONCLUSION

For the reasons states above, Tomas and Eraclio Martinez respectfully request this Board deny the Motion to Dismiss filed by the Water Rights Program. Tomas and Eraclio Martinez request a telephonic hearing be scheduled on the Water Rights' Motion to Dismiss. Given the deadlines currently in place, this hearing should be conducted as soon as possible.

Respectfully submitted this 3rd day of February, 2023.

ATTORNEYS FOR TOMAS AND ERACLIO
MARTINEZ.

By: /s/ Matthew E. Naasz _____

Matthew E. Naasz
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: mnaasz@gpna.com

CERTIFICATE OF SERVICE

I hereby certify on February 3, 2023, a true and correct copy of a **TOMAS AND ERACLIO MARTINEZ'S RESPONSE TO MOTION TO DISMISS** was served upon the following individuals by Email and U.S. Mail, postage prepaid:

Rodney Freeman, Prehearing Chairman Water Management Board
Joe Foss Building
523 East Capitol Avenue Pierre, SD 57501

Ann F. Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
ann.mines@state.sd.us

Susan Anderson
Elk Mountain Water Users Association, Inc.
P.O. Box 6062
Custer, SD 57730

Robert J. Galbraith
Nooney & Solay, L.L.P.
P.O. Box 8030
Rapid City, SD 57709-8030

William and Susan Paulton
10666 Pass Creek Road
Edgemont, SD 57735

Travis Paulton
10693 Pass Creek Road
Edgemont, SD 57735

Jim and Charel Pitts
25385 Gillette Canyon Road
Newcastle, WY 82701

David M. McVey
Assistant Attorney General
Counsel for Water Management Board
1302 East Highway 14, Suite 1
Pierre, SD 57501

By: /s/ Matthew E. Naasz
Matthew E. Naasz

EXHIBIT

A

SOUTH DAKOTA WATER WELL COMPLETION REPORT

07-92

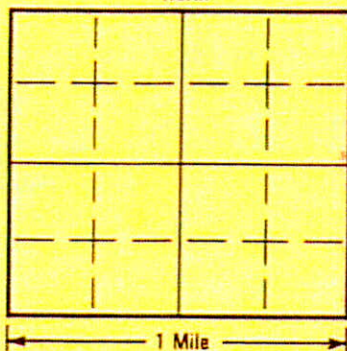
Location 1/4 SW 1/4 Sec 21 Twp 45 Rg 7E
 County CUSTER

Please mark well location with an "X"

By Ellis Mt School

Well Completion Date

4-5-01



LOCATION:

Distance from nearest potential pollution source (septic tank, abandoned well, feed lot, etc.)? 100 ft. from septic (identify source)

PROPOSED USE:

☒ Domestic/Stock ☐ Municipal ☐ Business ☐ Test Holes
☐ Irrigation ☐ Industrial ☐ Institutional ☐ Monitoring well

METHOD OF DRILLING:

Rotary Down hole Hammer

CASING DATA:

☒ Steel ☐ Plastic ☐ Other

If other describe 1025' - 5" steel

PIPEWEIGHT	DIAMETER	FROM	TO	HOLE DIAMETER
LB/FT	<u>5</u> IN	<u>0</u> FT	<u>1025</u> FT	<u>6 3/4</u> IN
LB/FT	IN	FT	FT	IN
LB/FT	IN	FT	FT	IN

GROUTING DATA

Grout Type	No. of Sacks	Grout Weight	From	To
<u>Port H</u>	<u>50</u>	<u>11-15</u> lb./gal	<u>0</u> ft	<u>1025</u> ft
<u>at 8% Bt</u>		lb./gal	ft	ft

Describe grouting procedure

SCREEN: ☐ Perforated pipe ☐ Manufactured none

Diameter _____ IN Length open hole FEET

Material _____

Slot Size _____ Set From _____ Feet to _____ Feet

Other information _____

WAS A PACKER OR SEAL USED? ☐ YES ☒ NO

If so, what material? Case set Madison

Describe packer(s) and location? _____

DISINFECTION: Was well disinfected upon completion? Chlorine

YES, How: Solution

NO, Why Not? _____

Laboratory sent to for water quality analysis _____

Well Owner: Tom Martinez

Business Name: HC 2650 Dewey Rd

Address: Edgemont S.D.

WELL LOG:

FORMATION	DEPTH	
	FROM	TO
<u>Spearsfish</u>	<u>0</u>	<u>65</u>
<u>minnesota L.S.</u>	<u>65</u>	<u>100</u>
<u>Gooche</u>	<u>100</u>	<u>190</u>
<u>minnesota S.S.</u>	<u>190</u>	<u>580</u>
<u>minnesota L.S. marker</u>	<u>580</u>	<u>590</u>
<u>minnesota S.S.</u>	<u>590</u>	<u>1020</u>
<u>Madison fractured L.S.</u>	<u>1020</u>	<u>1140</u>
<u>H2O - 30 gpm</u>		
<u>324</u>		

STATIC WATER LEVEL 890 Feet

If flowing: closed in pressure _____ PSI

GPM flow _____ through _____ inch pipe

Controlled by ☐ Valve ☐ Reducers ☐ Other _____

Reduced Flowrate _____ GPM

Can well be completely shut in? _____

WELL TEST DATA:

☒ Pumped W/AIR Describe: 30.5 gpm

☐ Bailed _____

☐ Other _____

Pumping Level Below Land Surface

_____ ft. After _____ Hrs. pumped _____ GPM

_____ ft. After _____ Hrs. pumped _____ GPM

If pump installed, pump rate _____ GPM

REMARKS

RECEIVED

FEB - 4 2002

This well was drilled under license # 324 WATER RIGHTS PROGRAM

And this report is true and accurate.

Drilling firm Alexander Drilling Inc.

Signature of License Representative:

By Alexander

Signature of Well Owner or Equitable Property Holder:

Tom Martinez

Date: 5-13-2001



Water Well Completion Reports

Go Back

Go Forward

SEARCH WELLS
Help Tools

DRILLERS

PUMP INFO

Miles

Measurement Result

0.63 Miles

TRS labels ☒ label darkness ☐

Search

T004S R001E S20

27666

Compl Rpt: 00055229.

Last Name: MARTINEZ

First Name: TOM

Business:

County: Custer

Well Type: DOM

Township:

Range:

Section:

QQ: SW

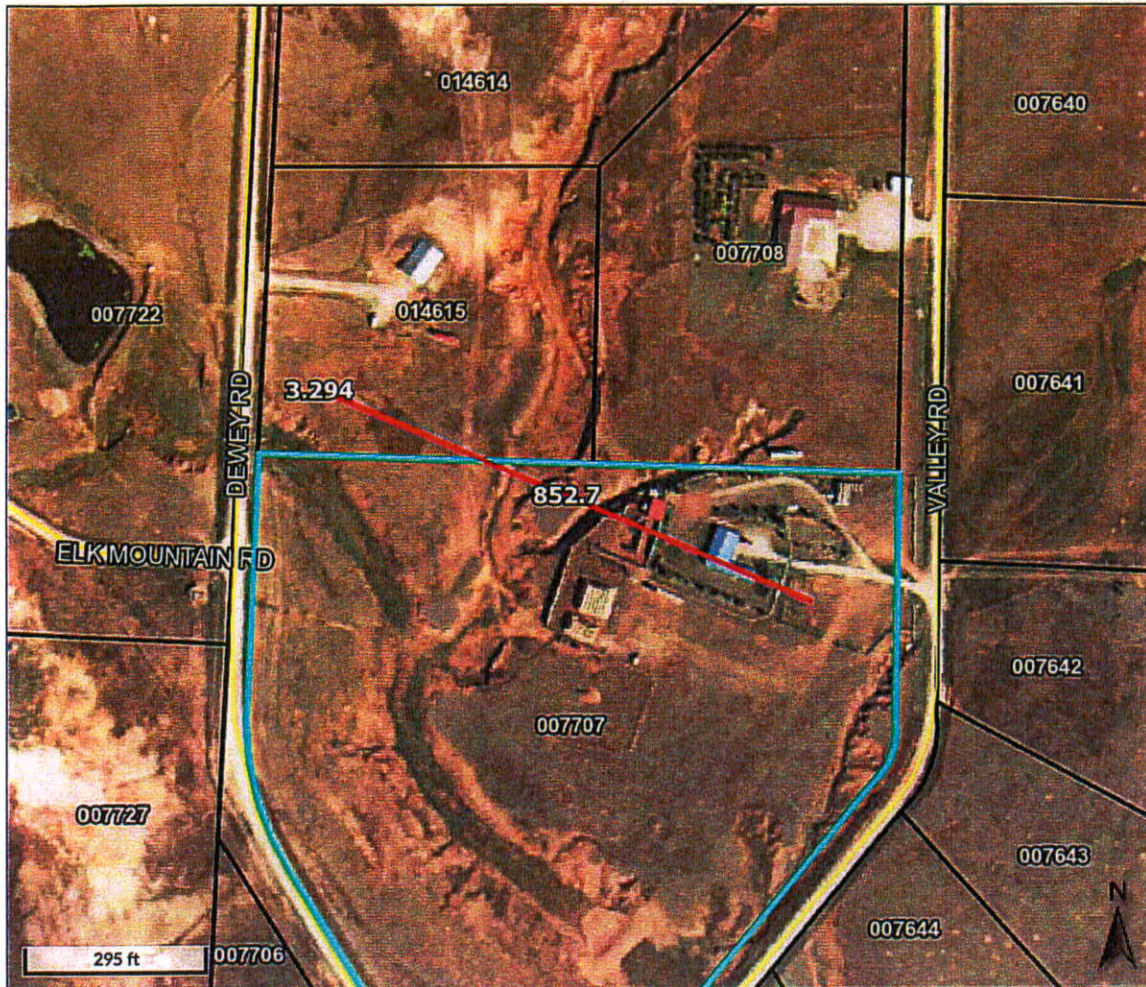
Latitude: 43.004170

Longitude: -104.00956

Driller No.: 324

Compl Date: "Mon 05

Streets



Overview



Legend

- Corporate Limits
- Highways
 - SD Hwy
 - US Hwy
 - Roads
- Parcels

Parcel ID	007707	Alternate ID	n/a	Owner Address	MARTINEZ TOMAS L & IRMA M
Sec/Twp/Rng	021/0004/001	Class	Agricultural		10216 VALLEY RD
Property Address	10216 VALLEY RD	Acreage	20		EDGEMONT, SD 57735-5010
	EDGEMONT				

District 16.2-1-1-0-0

Brief Tax Description ELK MT RANCHES SUBD TR 75 SEC 21 T4 R1 20 AC
MH AS RE-1996 LIBERTY HERITAGE HOMES 16X80
SERIAL # 06L27155
TITLE # 153361390
1040102100000700

(Note: Not to be used on legal documents)

Parcels are not adjusted to match aerial background. GIS information is for reference purposes only and is not a legal document. Data may contain errors.

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RECEIVED
NOV 30 2012
WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF POWERTECH,)
)
 APPLICATION NOS. 2786-2)
 2686-2)

MOTION OUT OF TIME TO PETITION TO INTERVENE AND OPPOSITION TO APPLICATION

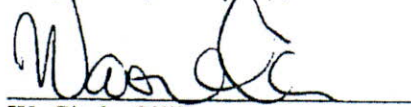
The Oglala Sioux Tribe, a federally recognized Indian tribe, by and through its undersigned counsel, hereby files its motion out of time by two business days as it was unable to fully review the application to prepare for hearing and objects to the above-described application to appropriate water filed on behalf of Powertech. This objection is based upon the grounds and for the reasons as follows:

- 1) That the granting of such permits will adversely affect the future surface and subsurface water rights of Oglala Sioux Tribe and its members in their ability to use our water resources for domestic, commercial, and other uses.
- 2) The proposal for a uranium mine northwest of Edgemont would use large amounts of water. Powertech Uranium has asked the state for a permit to extract 551 gallons per minute from the Madison aquifer. They have also applied for a permit to extract 8,500 gallons per minute from the Inyan Kara formation. 9,000 gallons per minute equals 12,960,000 gallons per day.
- 3) According to the company, the project may last as long as 20 years. The company plans to drill two or more wells into the Madison aquifer and a total of 1500 wells into the Inyan Kara.
- 4) Approximately 1000 wells would operate at any one time. According to the company, the project would consume (use up) 2.76 billion gallons of the water which would no longer be available to communities, ranches, and members of the Oglala Sioux Tribe.
- 5) After it is used for mining, the water that is not consumed or left in the aquifer would be treated in one of two ways: The company prefers to pump it underground -- below drinking water sources - where it would no longer be available to communities, ranches, and families. It could be sprayed on the ground, which has created a build-up of toxic materials, including selenium, at other sites.
- 6) The permit area is in a semi-arid area, and droughts are a regular occurrence. If this project goes through, we will lose access to critical groundwater resources.

- 7) The Oglala Sioux Tribe further objects to these applications for our water rights as they will interfere with and adversely affect existing water rights which is not in the best interests of the tribe and its members.

Dated this 28th day of November, 2012.

Respectfully submitted,



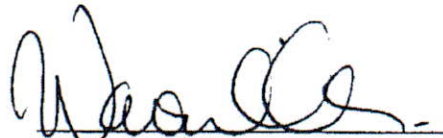
W. Cindy Gillis
Attorney for the Oglala Sioux Tribe
522 Seventh Street, Suite 202
Rapid City, South Dakota 57701
Tel: (605) 716-6355
Fax: (605) 716-6357

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the foregoing **PETITION TO INTERVENE AND OPPOSITION TO APPLICATION** on the 28th day of November, 2012, by email, fax and/or mailing a copy by First Class Mail, postage fully prepaid, from the United States Post Office at Rapid City, South Dakota to the following persons:

CHIEF ENGINEER
Water Rights Program
523 E. Capitol
Pierre, S.D. 57501

POWERTECH
c/o Richard Blubaugh
5575 DTC Parkway, Suite 140
Greenwood Village, CO 80111



W. Cindy Gillis
Attorney for the Oglala Sioux Tribe

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

IN THE MATTER OF WATER)
APPLICATION NO. 2850-2, Elk)
Mountain Water Users Association,)
Inc.)

**AFFIDAVIT OF
ERACLIO MARTINEZ**

I, Eraclio Martinez, one of the Petitioners in the above captioned matter, being first duly sworn upon my oath, state and declare as follows:

1. I assist my parents and my wife with our family ranching operation, which is located at 10216 Valley Road, Edgemont, SD 57735.

2. Attached hereto as Exhibit A is map printed from the Custer County GIS system. This map accurately reflects the location of the domestic well referred to as the “Martinez Well” in our Response to the Motion to Dismiss our Petition filed by the Water Rights Program.

3. My entire family and I went on a summer vacation during the time that the Notice of Application was published in the local newspaper.

4. By the time we returned from vacation, the petition date had passed.

5. We do not subscribe to any printed newspaper. Our neighbor provided the Notice of Recommendation to us after we returned from vacation.

6. When we discovered that the Application included utilization of the well for commercial purposes, we were surprised. Prior to this, we had been told that a future well was being contemplated, but that the well would be used for fire protection purposes and for the Elk Mountain School.

7. Even though we live, and our well is located next door to the fire hall where the well will be located, we were not made aware of this Application other than by our neighbors who provided a copy of the petition to us.

8. Upon reviewing the Notice of Recommendation, we filed our petition as quickly as possible.

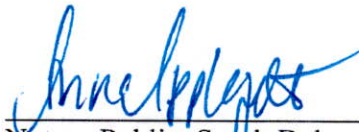
FURTHER AFFIANT SAYETH NOT.

Dated: February 3, 2023.



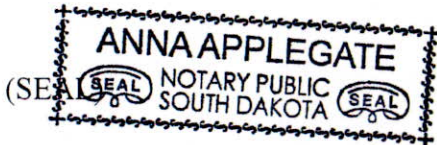
Eraclio Martinez

Subscribed and sworn to before me by Eraclio Martinez this 3rd day of February, 2023.



Notary Public, South Dakota

My commission expires: 9/11/2023



ATTORNEYS FOR TOMAS AND ERACLIO
MARTINEZ

By: /s/ Matthew E. Naasz

Matthew E. Naasz
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: mnaasz@gpna.com

CERTIFICATE OF SERVICE

I hereby certify on February 3, 2023, a true and correct copy of a
AFFIDAVIT OF ERACLIO MARTINEZ was served upon the following individuals by Email
and U.S. Mail, postage prepaid:

Rodney Freeman, Prehearing Chairman Water Management Board
Joe Foss Building
523 East Capitol Avenue Pierre, SD 57501

Susan Anderson
Elk Mountain Water Users Association, Inc.
P.O. Box 6062
Custer, SD 57730

Robert J. Galbraith
Nooney & Solay, LLP
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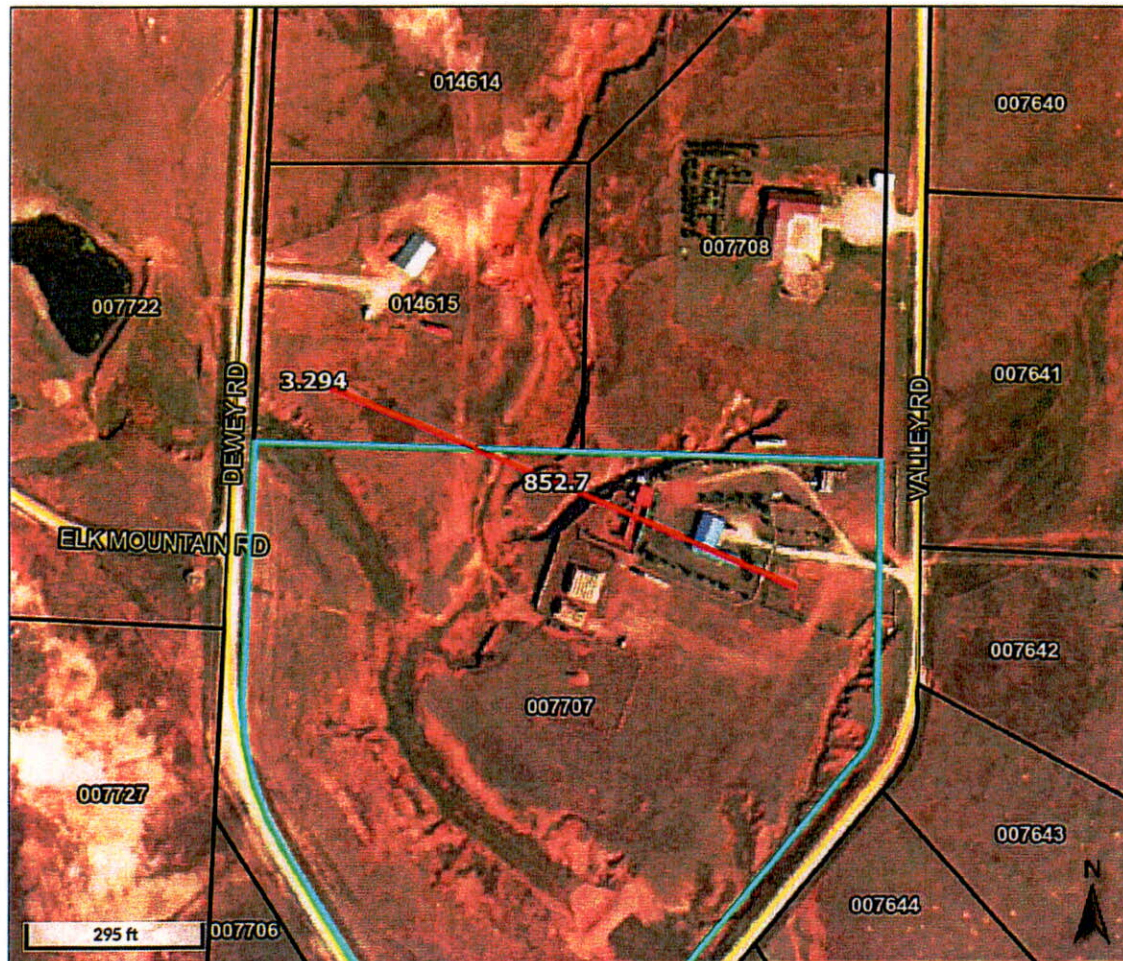
Ann F. Mines Bailey
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Counsel for Water Management Board
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david.mcvey@state.sd.us

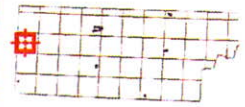
By: /s/ Matthew E. Naasz
Matthew E. Naasz

EXHIBIT

A

 **Beacon**TM Custer County, SD


Overview



Legend

-  Corporate Limits
- Highways
 -  SD Hwy
 -  US Hwy
-  Roads
-  Parcels

Parcel ID	007707	Alternate ID	n/a	Owner Address	MARTINEZ TOMAS L & IRMA M
Sec/Twp/Rng	021/0004/001	Class	Agricultural		10216 VALLEY RD
Property Address	10216 VALLEY RD	Acreage	20		EDGEMONT, SD 57735-5010
	EDGEMONT				

District 16.2-1-1-1-0-0

Brief Tax Description ELK MT RANCHES SUBD TR 75 SEC 21 T4 R1 20 AC
MH AS RE-1996 LIBERTY HERITAGE HOMES 16X80
SERIAL # 06L27155
TITLE # 153361390
1040102100000700

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